No. 10-552

SUPREME COURT, U.S.
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In The Supreme Court of the United States

ALBERT KRANTZ, *et ux.*,

Petitioners,

v.

ARKANSAS DEPARTMENT OF HUMAN SERVICES; MINOR CHILDREN,

Respondents.

On Petition For A Writ Of Certiorari To The Arkansas Court Of Appeals

BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. In reviewing an appeal of an adjudication of children as "dependent-neglected" under the Arkansas Juvenile Code, Ark. Code Ann. § 9-27-301 *et seq.*, was the Arkansas Court of Appeals required to apply strict scrutiny to the parents-Petitioners' challenge to the state court's requirement under its remedial "case plan" that Petitioners find housing and employment separate from the Tony Alamo Christian Ministries compound?

2. Did the state courts' case-plan requirement of separate housing and employment violate the Petitioners' due process right to family integrity? (Petitioners' presentation of the question is incorrect. The issue presented to and decided by the Arkansas Court of Appeals was whether "two provisions of the case plan violate[d] [petitioners'] right to freely exercise [their religion]" (App. 18). Whether the initial *removal* of the children violated Petitioners' due process rights was neither raised nor decided by the Arkansas Court of Appeals).

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The opinion of the Arkansas Court of Appeals, *Krantz v. Ark. Dep't of Human Servs.*, is reported at 2010 Ark. App. 316, 2010 WL 1487246 (Ark. App. April 14, 2010) (App. 1-2).[1] This opinion incorporates by reference the decision of *Thorne v. Ark. Dep't of Human Servs*, 2010 Ark. App. 317, 2010 WL 1486918 (Ark. App. April 14, 2010), which was modified on rehearing at 2010 Ark. App. 443, 2010 WL 1988182 (May 19, 2010). The Arkansas Court of Appeals denied petitioners' request for a rehearing on May 19, 2010 (App. 35) and the Arkansas Supreme Court denied petitioners' request for review on June 24, 2010 (App. 37).

STATUTES AND CONSTITUTIONAL PROVISIONS

This case involves the application of provisions of the Arkansas Juvenile Code, Ark. Code Ann. §§ 9-27-301 *et seq.* to the petitioners' children. Provisions applicable in this case include: Ark. Code Ann. § 9-27-303 (definitions of "abuse," "neglect," and "dependent-neglected juvenile"); Ark. Code Ann. 9-27-327 (dependency-neglect adjudication hearings); and Ark. Code Ann. § 9-27-334 (disposition of dependency-neglect cases).

[1] All references to the Appendix in this document are to the Appendix of the Petition for Writ of Certiorari.

Petitioners have invoked the Free Exercise Clause of the First Amendment to the U.S. Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." and § 1 of the Fourteenth Amendment to the U.S. Constitution, which provides, *inter alia*, " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

In September of 2008, the Arkansas Department of Human Services (DHS), in cooperation with the Federal Bureau of Investigation (FBI) and the Arkansas State Police, entered the Tony Alamo Christian Ministries (TACM) compound in Fouke, AR, after receiving numerous reports of sexual and physical abuse of children occurring at the facility. The petitioners' children were among those removed by DHS and placed into protective custody, either during this initial raid or shortly thereafter. The Circuit Court of Miller County, Arkansas subsequently found probable cause to maintain petitioners' children in state custody pending adjudication of dependency-neglect.

Due to the commonality of witnesses and evidence in the multiple dependency-neglect cases initiated by the Alamo removals, the Miller County Circuit Court consolidated the cases and held an

omnibus adjudication hearing (App. 4). The extensive evidence of severe abuse and neglect of children at the Alamo compound is amply recounted in the state court decisions at App. 1-34 in the Petition for Certiorari.

The evidence, among other things, revealed that the compound's leader, Bernie Lazar Hoffman (aka "Tony Alamo"), was and remains a dominating and controlling figure and was often the main perpetrator of abuse along with his accomplice John Kolbeck. Hoffman and Kolbeck, however, were not the only persons involved in either perpetuating or condoning the sexual and physical abuse of children.[2] The state court found that the petitioners, who had been members of the compound for their entire adult lives, failed to protect their children against physical abuse despite being aware of a "pattern and practice . . . carried out by [Tony Alamo] and his agents . . . to enforce by brutal, physical attacks adherence to [Tony Alamo's] will" (App. 27-28). The state court also found that petitioners were aware of the practice of invalid underage marriages occurring at the compound and of Tony Alamo's propensity for marrying multiple wives, and that petitioners permitted and condoned

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[2] Hoffman was subsequently sentenced to a total of 175 years in a federal prison for transporting underage children across state lines for sexual purposes. Kolbeck evaded capture and is wanted by the FBI. *See* http://www.fbi.gov/wanted/additional/john-erwin-kolbek/view (last accessed November 9, 2010).

an abusive practice called "Diesel Therapy" wherein school-age teenagers who violated the rules of the compound were removed from their families and forced to travel nationwide in support of Alamo's multiple business ventures, without any access to schooling (App. 27-28).[3] The state court thus found, by a preponderance of the evidence (the correct standard in the non-permanent context of dependency-neglect adjudication), that the petitioners' children were dependent-neglected and needed state protection and the remedial measures afforded under the Arkansas Juvenile Code.

ARGUMENT

Petitioners Fail to State Grounds for Granting Writ of Certiorari

Supreme Court Rule 10(a)-(c) describes the three common bases for granting a writ of certiorari. Petitioners do not allege that their petition fits any of these criteria. Rather, they argue that the Arkansas Court of Appeals (1) erroneously applied a "balancing test," rather than strict scrutiny, to their Free Exercise and Due Process Clause challenges to the state

[3] Whether Alamo operated a "church" or business ventures solely for his benefit has been a matter of dispute before the Internal Revenue Service (IRS). *See, e.g., Music Square Church v. United States*, 218 F.3d 1367 (Fed. Cir. 2000) (describing IRS' refusal to recognize Alamo ventures as tax-exempt organizations).

courts' adjudications of their children as dependent neglected; and (2) erroneously reviewed the evidence under an inadequate level of scrutiny because the case was a hybrid of due process and free exercise rights. Certiorari should not be granted because "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *See* Supreme Court Rule 10. In any event, there is no need to grant certiorari because the Arkansas Court of Appeals properly applied the relevant Constitutional law, and no conflict in the Federal circuits exists as to the issues in this case.

Strict scrutiny does not apply because there is no law or state action targeting religious activity in this case.

There are two fatal flaws in the Petition for Certiorari. One is factual and one is legal. First, the state court did not order the petitioners to "disassociate from their religion" as petitioners erroneously state. Second, strict scrutiny does not apply to this case.

The Petition misstates the facts of the case when it claims that the state dependency-neglect court ordered the petitioners to "disassociate from their Church." Petition at 2, 8. Rather, after recounting the evidence of widespread abuse and neglect of children occurring at the compound and petitioners' awareness of such practices, the state trial court ordered, as

a condition of a dependency-neglect case plan for reunification, that the petitioners obtain safe living arrangements for their children and employment to support such arrangements (App. 30-31). There is no order curtailing petitioners' presence at the Alamo compound.

Safe housing and sufficient employment are legitimate and common conditions for reunification in Arkansas dependency-neglect actions concerning any parent, religious or secular, whose children have been removed from a potentially harmful environment. *See Carroll v. Ark. Dep't of Human Services*, 85 Ark. App. 255, 262, 148 S.W.3d 780, 784 (Ark. App. 2004) (parents' failure to secure safe and appropriate housing of their own is contrary to their children's well-being and best interest); *Dinkins v. Ark. Dep't of Human Services,* 344 Ark. 207, 214, 40 S.W.3d 286, 292 (Ark. S. Ct. 2001) (same).

The state court's requirement that the petitioners must find safe housing apart from the compound in order to be reunified with their children was amply supported by the evidence. As recounted by the Arkansas Court of Appeals, "[t]he evidence presented at the hearing overwhelmingly demonstrated that the environment at the [Alamo] compound in Fouke is potentially dangerous for the children of its members." *Seago v. Ark. Dep't of Human Servs.,* 2009 Ark. App. 767, ___ S.W.3d ___, 2010 WL 3852785 (Ark. App. Nov. 18, 2009); *see also Broderick v. Ark. Dep't of Human Servs.,* 2009 Ark. App. 771, ___ S.W.3d ___, 2009 WL 3853149 (Ark. App. Nov. 18, 2009) ("[t]he

evidence introduced at this hearing presented a clear picture of the danger to children in the ministry compound at Fouke").

State courts never limited the petitioners' ability to attend activities at the Alamo compound, including any activities the petitioners may view as religious. The state courts simply required that the petitioners obtain living arrangements (and employment to support such arrangements) away from the Alamo compound where harm to children is an ever-present risk. The state courts had no evidence that the potential harm would not continue to exist within the compound, especially given the petitioners' continuing refusal to acknowledge their responsibility for these acts or omissions, the longstanding nature of the practices, and the traditional control that Tony Alamo has exerted over his enterprises even from within prison. The state court also found that petitioners' testimony that these abuses did not occur "is not credible" (App. 32). These decisions were within the province of the state trial court to make after evaluating all of the evidence and assessing the credibility of the witnesses.

The issue of law in the state proceedings below was whether petitioners' children were dependent-neglected as a result of acts or omissions of the parents, under the Arkansas Juvenile Code. Dependency-neglect adjudication is not a permanent disposition of parental rights and the allegations must be proved by a preponderance of the evidence. Ark. Code Ann. § 9-27-325(h)(2)(B). The goal of these proceedings is to

obtain court supervision for abused or neglected children and to implement remedial plans for the parents to follow to be reunified with their children.

In this case, the Constitutional question properly raised to and considered by the Arkansas Court of Appeals did not concern the propriety of the initial removal of the children from the Alamo compound. Neither did it strictly concern the propriety of the adjudication of the children as dependent-neglected. Rather, the Arkansas Court of Appeals only reviewed whether the trial court's remedial case plan for the parents violated the petitioners' free exercise rights by requiring the petitioners to find safe housing and employment separate from the Alamo compound (App. 18).

The actions of the Respondents (as well as those of the state court that issued the orders that guided Respondents' actions) were undertaken under "valid and neutral law[s] of general applicability," and as such the actions of the state are not subject to strict scrutiny. *See Employment Div., Or. Dep't of Human Res. v. Smith*, 494 U.S. 872, 878-79, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Dependency-neglect statutes apply equally to all parents, religious or secular, and prohibit child sexual and physical abuses, which are not protected religious practices.

The Free Exercise Clause does not excuse petitioners from complying with neutral laws of general applicability. There is no constitutional right to raise children in a potentially harmful environment – regardless of the religious context of that environment. *Prince v. Massachusetts,* 321 U.S. 158, 166-167, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (upholding child labor laws applied to custodian of a child who allowed minor to distribute religious literature, and stating that "the right to practice religion freely does not include liberty to expose [a] . . . child . . . to ill health or death").

The petitioners gravely overstate the majority opinion in *Church of the Lukumi Babalu Aye* (cited and quoted at App. 7, 10). *Lukumi Babalu Aye*, to the contrary, reiterated the holding of *Smith, supra,* that neutral laws of general applicability do not violate the Free Exercise Clause when applied to members of religious sects in the absence of any evidence that the law or state action was motivated by a desire to suppress religious practices. *Lukumi Babalu Aye's* ultimate application of strict scrutiny to the facts of that case resulted because the law at issue "fail[ed] to prohibit nonreligious conduct that endanger[ed] the [government's] interests in a similar or greater degree" as compared with the religiously motivated conduct that was prohibited. *Lukumi Babalu Aye,* 508 U.S. at 543, 113 S.Ct. 2217 (religious sacrifice of animals was prohibited, but other forms of animal slaughter were not).

Here, there are no laws or state actions "target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a religious motivation." *Lukumi Babalu Aye*, 508 U.S. 520 at 546, 113 S.Ct. 2217 at 2233. The targeted conduct in this case – child abuse and neglect – is illegal for any parent, religious or secular, to practice, and the remedial measures implemented by the state court here, such as requiring safe housing, are identical to those implemented nationwide in dependency-neglect cases every year. There was no evidence of any intent neither to tamper with a belief system nor to single out these petitioners for more intensive dependency-neglect prosecution because of their religious beliefs. Petitioners, understandably, never went so far as to assert that the outlawed practices occurring at the compound – sexual and physical abuse of children – were religious tenets that enjoy free exercise protection.

Even if the dependency-neglect court's actions would indirectly burden some of petitioners' religious conduct or practices, such as their belief they needed to live at the compound or risk excommunication by Tony Alamo, "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith,* 494 U.S. at 879. Petitioners' perception that their religious freedom was infringed is but incident to their stubborn refusal to accept the state courts' neutrally-motivated conclusion that their

current housing arrangements were not safe or suitable for children, and their refusal thus obtain safe living arrangements to remedy this circumstance.

Petitioners' pleas as to their good character as parents are not well-taken (App. 10). "Neglect" is defined in the Arkansas Code, among other things, as acts or *omissions* of a parent that constitute a "failure to take reasonable action to protect the juvenile from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness when the existence of this condition was known or should have been known." Ark. Code Ann. § 9-27-303(18)(A).

Arkansas courts have long recognized that a parents' refusal to accept responsibility for subjecting a child to potential harm is a valid ground for adjudging a child dependent-neglected and providing that child with the protection of the dependency-neglect court, and even a valid ground for eventual termination of parental rights. *See, e.g., Jones-Lee v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 160, 316 S.W.3d 261 (Ark. App. 2009). These principles apply to all parents and have never been selectively applied to the petitioners on the basis of their religious beliefs. There is no evidence in the record suggesting that Respondents were motivated to seek the protection of the dependency-neglect courts for petitioners' children because its administrators "disapprove[d] of a particular religion or of religion in general." *Lukumi Babalu Aye*, 508 U.S. at 532, 113 S.Ct. 2217.

This case is not a hybrid of family-integrity due process and free exercise rights.

Petitioners argue that the Arkansas Court of Appeals ignored their due process right to family integrity when reviewing the sufficiency of the evidence for removing the children and specifying its dependency-neglect remedies. Petition at Section II. To the extent this argument seeks review of the initial removal, however, it is not the question presented to and decided by the Arkansas Court of Appeals (*see* App. 18). Nevertheless, the argument reflects petitioners' fundamental misunderstanding of this Court's "hybrid rights" precedents.

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions as to the care, custody and control of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). However, "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). The state's compelling interest in protecting a child's safety exists even when religious and parental rights are asserted. *Prince*, 321 U.S. 158, 166-167, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (the "right to practice religion freely does not include liberty to expose [a] . . . child . . . to ill health or death.").

The substantive due process right to control the parents' upbringing of a child only fuses with free exercise rights and compels strict scrutiny review of the evidence when a *bona fide* parental-integrity interest exists. *Smith* discussed the possibility of strict scrutiny where a free exercise claim was joined to a claim regarding the right of parents to control the *education* of their children. *Smith*, 494 U.S. at 881, 110 S.Ct. at 1601 ("[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously-motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children"); *see also Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Unlike educational prerogatives, however, there is no *bona fide* parental right to raise a child in an environment proven to be harmful. This Court has never found that parental or free exercise rights categorically trump the state's compelling interest in protecting children in matters of health or safety.

Thus, the petitioners' claim that the state courts should have reviewed this case under a more exacting lens must fail. The Arkansas Court of Appeals was

correct when it stated in the incorporated opinion under review: "a parent's right of conscience in religious matters, however, sometimes collides with state laws of general application promulgated for the protection of children and other citizens." *Thorne*, 2010 Ark. App. 317, 2010 WL 1486918 (App. 21). As also stated by the Court of Appeals, "Arkansas law recognizes this delicate balance. 'Parents, of course, have a fundamental right to direct the care and upbringing of their children. But the State of Arkansas has an equally compelling interest in the protection of its children.'" *Id. quoting Porter v. Ark. Dep't of Health and Human Servs.*, 374 Ark. 177, 185, 286 S.W.3d 686, 693 (2008). There was no Constitutional infirmity in these rulings.

CONCLUSION

In summary, the Arkansas Court of Appeals was not required to apply strict scrutiny in reviewing the trial court's application of valid and neutral state dependency-neglect laws and policies to the petitioners. Petitioner's argument that their due process right to family integrity was violated is also without merit. This Court should dismiss the Petition for Certiorari.

Respectfully submitted,

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